IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

WRIT PETITION NO. 5371 OF 2005.

Shastri Constructions Pvt. Ltd. ... Petitioner.
V/s.
Smt. Shailaja Wagh. ... Respondent.

Shri G.S. Godbole for the petitioner.
None for the respondent.

CORAM : V.C.DAGA, J.

DATED : 16.11.2005.

P.C. :

. This petition is directed against the judgment and order dated 21.9.2004 passed by the 15th Ad hoc Additional District Judge, Pune, in Reg. Appeal No. 106 of 2003 setting aside judgment and decree dated 22.12.2002 passed by the 2nd Additional Small Causes Judge, Pune, in Civil Suit No. 68 of 2000, whereby suit for possession was decreed and defendant was directed to hand over possession of the suit premises to the plaintiff, within 2 months from the date of decree and judgment.

Factual Matrix:

2. Factual matrix reveals that Civil Suit No. 68 of 2000 was filed by Shastri Constructions Pvt. Ltd., against respondent-defendant in the Small Causes Court, Pune, inter alia; for eviction of the defendant from the suit premises being CTS No.

1396, 97/98/6 and 7,Sadashiv Peth, Pune, admeasuring 310 sq.ft. (Ground floor) which was let out to the respondent- defendant, contending that respondent-defendant has acquired alternate accommodation and that she is not using the suit premises for the purpose for which it was let out and that she kept the premises unused for a period of more than 6 months and that she occasionally uses the premises with a view to avoid decree for eviction.

3. With the aforesaid frame of the suit, trial Court was pleased to issue summons to the respondent, who appeared and filed her written statement. By the said written statement, respondent denied all the contentions raised by the petitioner, original plaintiff-landlord.

4. The trial Court was pleased to frame issues relevant to the pleadings. The trial Court was pleased to record evidence. Petitioner-plaintiff examined its Managing Director Shri N.R.Shastri (Ex.16), while respondent examined herself (Ex.23), one Madhav Gokhale (Ex.30) and one Nelkantha Bhogale (Ex.31).

5. The trial Court after hearing both parties was pleased to decree the suit of the

petitioner-plaintiff, holding that the plaintiff has made out a case under section 13(1)(k) of the Bombay Rent Act and directed the respondent-defendant to hand over vacant and peaceful possession to the plaintiff within 2 months.

6. Being aggrieved by the aforesaid judgment and decree, respondent preferred Civil Appeal No. 106 of 2003 in the District Court at Pune, to challenge the judgment and decree dated 22.12.2002 passed by the 2nd Additional Small Causes Court, Pune, in Civil Suit No. 68 of 2000.

7. The Lower Appellate Court by the impugned judgment and decree dated 21.9.2004 was pleased to allow the appeal and set aside judgment and order of the trial Court.

8. The aforesaid judgment and order of the lower appellate Court subject matter of challenge in this petition filed under Article 227 of the Constitution of India.

Submissions:

9. Learned Counsel appearing for the petitioner contends that the impugned judgment of the trial Court is contrary to law. He further contends that

in the impugned judgment it is wrongly held that the suit premises was not used by the respondent continuously for a period of six months immediately preceding the institution of the suit. He further contended that mere casual stay for a day or two is not sufficient to reach to the conclusion that the premises is being used for the purpose for which it is let out. He contends that mere casual stay in the suit premises for a day or two in a month is just to avoid decree for eviction. According to him, lower appellate Court failed to consider these crucial facts in the light of the object and purpose of the legislation namely; the Bombay Rent Act.

10. Shri Godbole relied upon relied upon judgment of this Court in the case of **Govind Ramchandra Deo vs. Ramabai Vasudeo Pandit and ors. 1993 Mah.L.J. 437,** to contend that casual or spasmodic stay in the suit premises for 2 or 3 days in a month does amount to continuous use of thee suit premises for the purpose for which premises is let out.

11. Shri Godbole, Learned Counsel for the petitioner further placed reliance on the judgment of this Court in the case of **Achut vs. Sadashiv 1973 Mh.L.R. 153,** to contend that if non-user for a continuous period of six months prior to the suit

was without reasonable cause then, landlord is entitled to a decree for possession to evict tenant in view of provisions of section 13(1)(k) of the Act. He also placed reliance on one more judgment of the Gujarat High Court in the case of **Mohini Hingorani vs. Bhanubhai Patel, 1984 (2) Guj.L.R.1058** to buttress his submissions.

Consideration:

11A. Having heard learned Counsel for the petitioner, I do not think that any case is made out by the petitioner to exercise writ jurisdiction under Article 227 of the Constitution of India. Having gone through the impugned judgment and order of the lower appellate Court with the assistance of the learned Counsel for the petitioner, by no stretch of imagination the impugned order can be said to be a perverse order.

12. In the case at hand, petitioner-plaintiff has admitted in the plaint itself that respondent-tenant is using the suit premises once or twice in a month which goes to show that suit premises is in the occupation of the respondent-tenant. One cannot lose sight of the fact that the respondent is 78 years old house wife occupying suit premises, which is located on the ground floor of the building. She

has been staying therein for past 50 years. Suit premises is situate in the heart of the city which is considered to be a safe locality. She is having gas connection. Record shows consumption of gas cylinder every month. She is having her account in the bank. She also regularly pays MSEB bills which again shows regular consumption of electricity in the suit premises. All these factors are sufficient to show that the suit premises is in the use of the respondent-tenant. At any rate, evidence is on record to support the view taken by the lower appellate Court. Sufficiency of the evidence cannot be gone into in the writ jurisdiction.

13. It has also come in evidence that her elder son Mr. Shashank with his family was residing with the respondent in the suit premises. However, considering the growing need of his family; he appears to have decided to stay separately. His flat is on the 3rd floor of the building. If the respondent wants to go to his house, she has to climb 54 steps which she finds it difficult to climb. Her another son has taken a job at Sangli and due to service he has to be at the place of his work at Sangli. The evidence on record shows that sometimes she goes to reside with her son at Sangli and sometimes, goes to her another son Shirish, residing in Pune. This might be resulting in

non-occupation of the suit premises whenever she goes to her sons but that by itself is not sufficient to conclude that the suit premises is not in continuous use and occupation for a period of more than 6 months.

14. On the basis of the material evidence available on record, one cannot overlook reality of life that at the advance age, any person,especially, who is financially independent, would always like to maintain independent status rather than depending upon mercy of sons and daughters-in-law. But, at the same time, right to periodically stay with sons cannot be denied. Thus, taking into account weight of the evidence, it is very difficult to conclude that the respondent has not been using the premises continuously for more than 6 months. In my view, she is not liable to be evicted from the suit premises.

15. Considering the question of hardship, I do not think that petitioner will suffer any hardship especially, looking to the status of the petitioner that of a well established private limited Construction Company, who has number of projects at hands in the city of Pune.

16. Assuming for the sake of argument on the

basis of the material on record, second view may be possible, but that by itself would not be sufficient to set aside the impugned order in exercise of writ jurisdiction under Article 227 of the Constitution of India. The lower appellate Court being final fact finding Court has recorded a finding of fact that the premises is in use. The said finding is based on evidence which cannot be reappreciated to dislodge the findings of the Court below. Apex Court in the case of **Bhatumal Raichand Oswal vs. Laxmibai R. Tarte AIR 1975 SC 1297,** observed as under:

> " It is a litigation between landlord and tenant and as is usual it has been fought to a bitter end. Much of the agony to which the tenant has been subjected in this litigation would have been spared if only the High Court had kept itself within the limits of the supervisory jurisdiction and not ventured into fields impermissible to it under Articles 226 and 227 of the Constitution."

It is, thus, clear that the High Court while exercising jurisdiction under Article 227 cannot interfere with the findings of fact recorded by the subordinate Court or Tribunal. Its function is limited to seeing that the subordinate Court or Tribunal functions with the limits of its authority. Considering the dicta of the Apex Court in this behalf, it is not possible to interfere with the judgment and order passed by the Courts below.

17. In the above view of the matter, petition is devoid of any substance. The same is liable to be dismissed in limine with no order as to costs.

(V.C. DAGA,J.)